RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF GEORGIA'S OPPOSITION TO FLORIDA'S MOTION FOR LEAVE TO FILE A COMPLAINT

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INTRODUCTION

The flow of water from the Chattahoochee and Flint River basins in Georgia into the Apalachicola River in Florida is largely controlled by a system of federal dams and reservoirs operated by the U.S. Army Corps of Engineers. The Corps is currently updating the operating manual for those projects, and that process will directly affect the flow into the Apalachicola River. Florida, however, seeks to end-run those proceedings and embroil this Court in the same issues now pending before the Corps. The Court should not indulge Florida's attempt to disrupt the orderly resolution of what has already been a long-running dispute.

For more than two decades, Florida challenged, under the APA, the Corps' management of its dams in the Apalachicola-Chattahoochee-Flint Basin (ACF Ba-

sin). Florida contended that the Corps was adversely affecting threatened and endangered species by not allowing sufficient flow to cross the Georgia-Florida border into the Apalachicola River and that the Corps' operations were otherwise contrary to law. Florida's challenges were unsuccessful, and the litigation resulted in the Eleventh Circuit effectively requiring the Corps to undertake a study of the ACF Basin and update the decades-old Master Water Control Manual that specifies operating protocols for the Corps' ACF Basin projects. That process is actively underway. In completing that process, the Corps, exercising statutory authority delegated by Congress, will consider, among other things, effects on endangered and threatened species.

Florida, however, is not content to await the outcome of the Corps' deliberative process. Instead, it seeks to bypass that entire proceeding by asking this Court to engage in a common-law "equitable apportionment" of the States' rights to those waters. But Florida has brought its case against the wrong party, in the wrong court, and at the wrong time.

Florida attempts to plead around the role of the Corps, but the Corps is inescapably involved in any sensible adjudication of Florida's claims. No water enters the Apalachicola River from either the Chattahoochee or Flint River without passing through the Corps' Woodruff Dam, which is located at the Florida-Georgia border. Although the (unexplained) relief Florida requests is an order capping Georgia's consumptive water uses at the level existing on January 3, 1992, the injuries that Florida alleges—harm to threatened and endangered species and the oyster industry in the Apalachicola River and Bay—stem from purportedly inadequate minimum flows through Woodruff Dam during dry times.

The flow out of Woodruff Dam is precisely one of the issues that the Corps is examining even now in its revisions to its Master Manual. Determining flow rates involves the Corps' consideration of numerous technical issues, including the hydrology of the ACF Basin and potential impacts on the Apalachicola River and Bay, as well as the Fish and Wildlife Service's evaluation of any adverse impacts on federally protected and other species as part of the interagency consultation process required by the Endangered Species Act and the Fish and Wildlife Coordination Act. In submissions to the Corps, Florida has raised the very same contentions it raises here—that reduced flow into the Apalachicola is harming both protected species and the commercial oyster industry in the Apalachicola. Only after the Corps adopts a new Master Manual will it be possible to determine whether (1) the injuries that Florida seeks to prevent may actually come to pass, and (2) those injuries are caused by Georgia's water use.

An original action in this Court at this stage would disrupt that entire process and would proceed in a vacuum. Current flow conditions in the ACF Basin are a product of interim measures adopted by the Corps because of the practical constraints of years of litigation. No set of operations free from those artificial constraints will be established until the Corps completes its updated manual; any litigation before that process is complete—especially in this Court—makes little sense. Moreover, Florida's proposed complaint against Georgia ignores a key actor: The Corps is not a party, and Florida cannot make it a party unless the United States waives its sovereign immunity. Practical considerations, including the orderly resolution of disputes through customary procedures, strongly favor denial of Florida's motion for leave to file its complaint.

Florida's allegations of harm also have little claim to this Court's discretionary exercise of its original jurisdiction. As this Court has long held, that jurisdiction is extraordinary in nature and is to be exercised sparingly. A State must persuasively allege that it has suffered a "substantial injury," which must be proven by clear and convincing evidence. Florida's complaint gives barely a hint that its citizens are suffering any injury caused by a supposedly reduced flow into the Apalachicola—much less that any such injury is attributable to Georgia. Federal regulators have determined that the flow from Woodruff Dam does not jeopardize any federally protected species, and Florida has not pursued a challenge to that determination. Nor has Florida alleged any facts plausibly linking the sudden collapse of its oyster fishery in the 2012-2013 winter season to any action by Georgia; indeed, Florida has pointed only to other factors when raising the issue with other federal agencies.

At bottom, this is not a case that calls for this Court to exercise its extraordinary power to entertain a lawsuit between States. All of Florida's alleged harms concern the flow from dams operated by the Corps. The Corps is reexamining those operations, and its final conclusions can be challenged under the APA. Accordingly, this Court should deny Florida's motion for leave to file a bill of complaint.

STATEMENT

A. The ACF Basin

The ACF Basin encompasses a drainage area of roughly 19,800 square miles. *See* Army Corps of Engineers, *Final Updated Scoping Report: Environmental Impact Statement, Update of the Water Control Manu-*

al for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia 2 (Mar. 2013) (*Scoping Report*). Approximately 74% of that area is in Georgia and 15% is in Alabama; only 11% is in Florida. *Id.*; *see also* Fla. App. 1; App. 1a.

The Chattahoochee rises in northern Georgia and flows south through Georgia to the Florida border. Compl. ¶ 2.[1] Along the way, it passes Atlanta, where it serves as the primary source of water for 3.3 million people in the metropolitan region. Fla. App. 4. Further downstream, the Chattahoochee supports municipal, industrial, and agricultural needs in Georgia and Alabama all the way to the Florida state line.

The Chattahoochee is regulated by five federally owned dams operated by the Army Corps of Engineers. Compl. ¶ 22. Three of these dams—Buford, West Point, and Walter F. George—impound reservoirs that have substantial capacity to store water from the wet winter and early spring for release during the drier summer and fall. Because the Corps can store water in these reservoirs and choose the timing of releases, the Corps effectively controls how much water flows downstream from these dams at any time. The Corps' five dams are operated as "a unified whole" to serve several congressionally directed project objectives and other requirements of federal law. *Id.* For example, pending completion of the Master Manual, the Corps has determined to coordinate releases from its dams to maintain certain flows in the Apalachicola River for threatened and endangered species. App. 19a-23a.

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[1] A substantial portion of the Chattahoochee runs along the Georgia-Alabama border, but the river itself is in Georgia. *See Howard* v. *Ingersoll*, 54 U.S. (13 How.) 381, 388 (1852).

Buford Dam is the northernmost of the Corps' five dams and is located about 40 miles above Atlanta. The Corps has long operated Buford Dam to accommodate the Atlanta region's water supply needs, both by timing releases to provide sufficient flow for withdrawals downstream in Atlanta and by allowing withdrawals directly from the reservoir it impounds. *See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1171-1174 (11th Cir. 2011) (per curiam). Buford Dam has several authorized purposes besides water supply, including flood control, navigation, and the generation of hydroelectric power. *Id.* at 1200. The Corps manages the size and timing of releases from Buford Dam to accommodate these sometimes competing purposes.[2]

The Flint River also rises in northern Georgia. Essentially unregulated, it flows exclusively through Georgia, where it serves as a source of irrigation for southwestern Georgia's agricultural region, which annually generates two billion dollars in farm-based revenue. The Flint River joins the Chattahoochee just above the southernmost of the Corps' five projects, Woodruff Dam. Compl. ¶ 20; *see* App. 1a. The resulting reservoir spans the border between Georgia and Florida.

The Apalachicola River begins at Woodruff Dam and flows exclusively through the Florida panhandle, terminating at the Apalachicola Bay in the Gulf of Mexico. Compl. ¶ 20. No water flows into the Apalachicola from either the Chattahoochee or Flint River unless and until the Corps releases it from Woodruff Dam. Because Woodruff Dam does not have significant stor-

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[2] *See, e.g.*, Stockdale, *Memorandum for the Chief of Engineers re Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia* 27-28 (June 25, 2012) (Stockdale Mem.).

age capacity, the Corps regulates the flow into Florida by scheduling releases further upstream to ensure that the combined flows of the Flint and Chattahoochee meet certain minimums. Thus, although the federal government does not own the water in the ACF rivers, the operations of the Corps effectively regulate the amount of water that reaches Florida.

B. Prior Litigation

For more than two decades, Florida, Georgia, the Corps, and other parties were enmeshed in litigation over the Corps' dam operations in the ACF Basin. That litigation, which began in 1990 and concluded in 2013, ultimately encompassed seven different suits brought against the Corps under the APA. In 2007, the suits were consolidated by a multi-district litigation panel and assigned to a single judge in the Middle District of Florida (No. 07-md-1). The cases were then divided into two phases. Phase 1 concerned the extent to which the Corps has authority to operate Buford Dam to provide water supply to the Atlanta region. Phase 2 concerned whether the Corps' operations—and the resulting flows into the Apalachicola—complied with federal environmental statutes.

The Phase 1 litigation ultimately reached the Eleventh Circuit, which issued two significant rulings. First, it dismissed an APA challenge by Florida that the Corps had exceeded its congressionally delegated authority in providing water from Buford Dam to Atlanta. The court held that, although the Corps had provided water to Atlanta on an ad hoc basis, decades of litigation had prevented the Corps from taking final agency action to determine how it would balance the various project purposes of Buford Dam, including providing water to the Atlanta area. *Tri-State*, 644 F.3d at 1181-

1185. Accordingly, the court held that there was no jurisdiction under the APA to hear Florida's challenge.

Phase 1 also involved an APA challenge by Georgia to a decision by the Corps rejecting Georgia's request for a permanent allocation of storage at Buford Dam sufficient to meet future water needs. The Corps had concluded that it lacked statutory authority to grant that request, but the Eleventh Circuit agreed with Georgia that the Corps had understated the extent of its authority to provide water to metropolitan Atlanta. *Tri-State*, 644 F.3d at 1188-1189. The court further held, however, that it remained unclear whether the Corps had authority to grant Georgia's water supply request in its entirety and remanded the matter so that the Corps could reassess the scope of its authority. *Id.* at 1196-1197. The court stated that this remand analysis should be done in conjunction with "a comprehensive decision about the Corps' future water supply operations." *Id.* at 1197. Florida unsuccessfully sought this Court's review of the Eleventh Circuit's ruling. 133 S. Ct. 25 (2012).

The Eleventh Circuit's ruling effectively required the Corps to devise and implement a final plan for operating Buford Dam and to undertake a comprehensive review of its integrated operation of all the dams in the ACF Basin. As explained below (pp. 10-12, 20-23), that administrative review is underway.

Phase 2 of the multi-district litigation concerned whether the Corps' operations of the system—and in particular, the rate and timing of flows from Woodruff Dam—are sufficiently protective of threatened and endangered species in Florida. Because the lengthy litigation over the ACF Basin had prevented the Corps from adopting a final water control plan to govern the

operations of its dams and reservoirs, the Corps adopted a Revised Interim Operating Plan (RIOP) to address the needs of threatened and endangered species in the Apalachicola River and Bay pending development of a comprehensive Master Manual for the ACF reservoirs. This RIOP specified flow levels to be maintained at the Georgia-Florida border under various hydrological conditions. The Corps obtained a 2008 Biological Opinion (BiOp) from the Fish and Wildlife Service (FWS), which concluded that the RIOP would not jeopardize endangered or threatened species or adversely modify their critical habitat.[3] Florida challenged the RIOP and the 2008 BiOp, but the district court rejected Florida's challenge. *See* Order, Dkt. 376 (July 21, 2010).

Florida appealed, but during the pendency of the appeal, FWS issued a new, 2012 BiOp, which superseded the 2008 BiOp, while reaching fundamentally similar conclusions.[4] Specifically, the 2012 BiOp confirmed that the RIOP will not jeopardize over thirty federally listed species in the Apalachicola, including those that Florida's present complaint alleges are harmed by Georgia's water consumption. *See* App. 35a (proposed action "will not jeopardize the continued existence" or "destroy or adversely modify designated critical habi-

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[3] The 2008 BiOp was prepared during the interagency consultation process required by Section 7 of the Endangered Species Act, 16 U.S.C. § 1536.

[4] FWS prepared the 2012 BiOp to evaluate new information about the distribution of certain mussels that had not been considered in the 2008 BiOp. Florida cites the 2012 BiOp in its complaint (¶ 53). Pertinent parts of the 2012 BiOp are reprinted in the appendix to this brief (App. 2a-36a); it is available in full at http://www.fws.gov/southeast/news/2012/pdf/woodruffBOFinal.pdf.

tat" for the fat threeridge, purple bankclimber, and Chipola slabshell mussels); *see also* App. 8a-10a; Fla. Br. 16. Because the 2012 BiOp mooted Florida's challenge to the 2008 BiOp, Florida terminated its appeal from the district court's decision; that ruling was vacated and the Phase 2 litigation was dismissed as moot. Order, Dkt. No. 391 (Jan. 25, 2013). Florida has not sued to challenge the 2012 BiOp.

C. The Corps' Ongoing Efforts To Reexamine Its Operations In The ACF Basin

The pendency of the *Tri-State* litigation effectively stymied the Corps from fully reexamining its operations in the ACF Basin. The Corps' Master Manual for the ACF system was last formally updated in 1958; a revised manual was drafted in 1989 but never finalized because of litigation initiated by Florida and Alabama. With the impediment of that litigation removed, the Corps is consulting with federal resource agencies and preparing an Environmental Impact Statement on its operations so that it can adopt a new Master Manual that fully considers present hydrological and environmental conditions and balances the various authorized purposes of the ACF projects while complying with environmental laws. *See Scoping Report* 1; 33 C.F.R § 222.5(f)(1). The Corps expects to issue a new Master Manual for public comment by 2015.[5]

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[5] Corps regulations require "developing a water control plan for each reservoir project, as well as a basin Master Water Control Manual (Master Manual) for the coordinated operation of multiple projects within a river basin." *Scoping Report* 18. The Master Manual outlines in general terms how the particular projects are to be operated to accomplish various project purposes. *Id.* 17-18. As the Corps has explained, "[u]pdated Water Control Manuals are needed to enable managers to strike the best balance possible

Among the matters to be decided in the new Master Manual is the rate of water release to the Apalachicola River at the Georgia-Florida border under various hydrological conditions. *Scoping Report* 18. Under the Corps' current RIOP, the Corps maintains a minimum flow at the Florida-Georgia border and makes greater releases, depending on the hydrological conditions and other operational parameters, to benefit threatened and endangered species. App. 16a-23a. In the new Master Manual, the Corps will decide whether to maintain or modify these operating rules. Many potentially affected parties, including Florida, have made submissions to the Corps concerning the appropriate rate and timing of flows into the Apalachicola. Florida has once again contended that the Corps must revise those flows to ensure protection for endangered and threatened species, and has also argued that the Corps' current operations are providing insufficient fresh water for the oyster fishery in the lower Apalachicola, which Florida claims are being harmed by increased salinity levels.[6] Those submissions will be part of the administrative record for the Corps' ultimate decisions.

The Corps will also consider Georgia's water supply request, which was at issue in the Phase 1 litigation. On remand from the Eleventh Circuit, the Corps issued a legal opinion concluding that it has authority to grant

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for the many purposes and demands. A complex set of factors is needed to determine appropriate water management at each lake. In addition to the authorized project purposes, power contract commitments, hydrologic and climatologic factors, downstream lake and basin-wide conditions, potential threats of flood and drought, and lake levels must all be considered."

[6] *See* Florida Department of Environmental Protection, *Comments on ACF Master Water Control Manual* 11-12 (Jan. 14, 2013) (*Florida Comments*).

Georgia's water supply request in its entirety. *See* Stockdale Mem. 48 ("The Corps has the legal authority to accommodate Georgia's request[.]"). The Corps did not, however, decide whether it would grant Georgia's request. Rather, the Corps explained that "[f]urther study, including environmental analysis and consideration of public comments, would be required prior to any decision to actually exercise some or all of this authority." *Id.* The Corps also noted that it "is presently engaged in an effort to update the water control plans and manuals for the ACF Basin," and that its conclusions about the scope of its authority would be taken into account as it "continues with that necessary and important process." *Id.*

In 2013, Georgia updated its water supply request. Fla. App. 3. Although Georgia continued to request storage to meet the same level of water supply as before, it submitted additional supporting detail and revised projections in an affidavit by Judson Turner, Director of the Environmental Protection Division of Georgia's Department of Natural Resources.[7] This affidavit explained that by 2040 the Atlanta region anticipates needing to withdraw up to 705 million gallons per day (mgd) of water from Buford Dam's reservoir and the Chattahoochee River, but that 78% of that water (550 mgd) will be returned to the basin as highly treated wastewater, rendering it available for use downstream. *Id.* 15-16. At that point, metropolitan Atlanta's consumptive use of water from the Chattahoochee River will be "a mere 1.1%" of the average daily flow of the Apalachicola River just downstream of the state line. *Id.* 16. Annexed to Mr. Turner's affidavit was a

[7] Mr. Turner's affidavit also detailed the extensive water conservation measures Georgia has undertaken. Fla. App. 9-13.

technical analysis showing that "net water consumption associated with the municipal and industrial withdrawals contemplated in Georgia's water supply request is projected to have a minor impact on the flow in the Apalachicola River at the state line." *Id.* 25; *see also* App. 47a-51a, 56a-57a.

ARGUMENT

I. THIS COURT'S STANDARDS FOR EXERCISING ITS ORIGINAL JURISDICTION ARE STRINGENT

By invoking this Court's original jurisdiction, Florida asks the Court to "exert its extraordinary power to control the conduct of one State at the suit of another." *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931). That is not a power this Court exerts lightly. To the contrary, the Court has consistently maintained that its "'original jurisdiction should be invoked sparingly,'" *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972), and that it will exercise that jurisdiction only in the "most serious of circumstances," *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995). As the Court has explained, its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900).

Thus, to justify exercise of this Court's original jurisdiction, a State must carry a burden significantly greater than that normally imposed in litigation between private plaintiffs. *See Alabama* v. *Arizona*, 291 U.S. 286, 292 (1934). Whereas district courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), this Court exercises its original jurisdiction only "'sparingly,'" *South Carolina* v. *North Carolina*, 558 U.S.

256, 267 (2010) (quoting *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992)). The fact that a case falls within this Court's original jurisdiction does not mean that this Court should or will assume that jurisdiction. Rather, this Court exercises "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983), "even as to actions between States where [its] jurisdiction is exclusive," *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992). In the exercise of such discretion, this Court often denies motions for leave to file an original complaint.[8]

Several principles guide the Court's discretion in determining whether to grant leave to file a bill of complaint. As an initial matter, the Court is traditionally reluctant to grant such leave where the dispute and the relief requested may be intertwined with proceedings pending in another forum. *See, e.g.*, *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) (declining original jurisdiction in light of pending state-court action); *Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 (1972) (declining original jurisdiction where dispute could be effectively resolved by federal district courts); *see also Illinois*, 406 U.S. at 93 (taking account of the "availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had").

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[8] *See, e.g.*, *Michigan* v. *Illinois*, 130 S. Ct. 2397 (2010); *Mississippi* v. *City of Memphis*, 559 U.S. 901 (2010); *Arkansas* v. *Oklahoma*, 546 U.S. 1166 (2006); *Arkansas* v. *Oklahoma*, 488 U.S. 1000 (1989); *South Dakota* v. *Nebraska*, 475 U.S. 1093 (1986); *United States* v. *Nevada*, 412 U.S. 534, 538-540 (1973) (per curiam).

Similarly, when deciding whether to entertain an original case, the Court has taken into account practical considerations of litigating the controversy, whether the Court may grant relief to the parties, and the alternative availability of adequate relief. For example, the Court has declined to exert jurisdiction where the United States is essential to a complete adjudication of the controversy but has not voluntarily become a party in this Court, *see Arizona* v. *California*, 298 U.S. 558, 568-572 (1936)—an even stronger consideration since the United States became subject to suit in district court under the APA. And the Court has declined to exercise jurisdiction where the controversy would inevitably involve complex technical questions that are properly within the province of expert federal agencies, and where challenges to those agencies' conclusions would be more suitable for litigation in a trial court. *See Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 503-505 (1971).

Finally, the Court is "traditional[ly] reluctan[t] to exercise original jurisdiction in any but the most serious of circumstances, even ... in cases between two or more States." *Nebraska*, 515 U.S. at 8. Thus, a complaining State must point to an injury of "'such seriousness that it would amount to *casus belli* if the States were fully sovereign.'" *Mississippi*, 506 U.S. at 77; *see also New York* v. *New Jersey*, 256 U.S. 296, 309 (1921) (requiring an "invasion of rights" of "serious magnitude" to warrant exercise of original jurisdiction). In the context of a common-law equitable-apportionment action, that at least requires a State to allege facts that, if proven, would amount to "clear and convincing evidence [of] some real and substantial injury or damage." *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1027 (1983). Insubstantial or speculative harms will not suffice.

Establishing the "substantial injury" necessary for an equitable-apportionment case is a weighty matter. When one State seeks to enjoin water usage by another, "the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties." *North Dakota* v. *Minnesota*, 263 U.S. 365, 374 (1923). And given the substantial costs to this Court and the parties of adjudicating such a case, the petitioning State's proposed complaint must persuasively make a case for exercise of that jurisdiction—surely more persuasive than the minimum in an ordinary civil case, wherein a party seeking relief must allege at least "sufficient factual matter" to "'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

II. Florida's Complaint Suffers From Severe Defects That Counsel Against Exercising Original Jurisdiction

Florida's proposed complaint falls well short of the demanding standard for exercise of this Court's original jurisdiction. Two interlocking flaws in that complaint demonstrate why the Court should decline jurisdiction. First, the source of Florida's alleged harm is inadequate flow at the state line; but whether the flow at the state line is inadequate cannot, as a practical matter, be meaningfully adjudicated unless and until the Corps establishes a final set of operating procedures for the ACF basin. That process will establish operating rules for water flows from Georgia into the Apalachicola, as well as other rules that will directly affect the flow at the state line. Once the Corps completes that task, then Florida, insofar as it is aggrieved by the Corps'

decisions, can seek to challenge those decisions in district court under the APA.

Second, Florida's extraordinarily weak complaint does not warrant this Court's discretionary exercise of jurisdiction. The allegations and materials relied upon by Florida fall far short of indicating imminent and substantial harm to Florida's sovereign rights. Florida mischaracterizes its own evidence about Georgia's consumption of water and wildly overstates the effect of that consumption on flow at the state line and any harm that might result from any slightly reduced flow. And Florida fails to acknowledge that most of its alleged harms have been extensively evaluated and rejected by expert federal agencies.

A. Florida's Suit Is At Best Premature

Florida's claim for equitable apportionment is essentially a claim about reduced flows into the Apalachicola out of the Corps' Woodruff Dam at the state line. The appropriate remedy for those reduced flows, Florida contends, is an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." Compl. 21. But that relief is disconnected from Florida's alleged injuries, which pertain only to flow at the state line, and Georgia cannot provide increased flow at the state line, at least not alone. It is the Corps that releases water from Georgia's Chattahoochee and Flint Rivers into the Apalachicola, through its management of Woodruff Dam (the spigot to the Apalachicola) and the integrated system of reservoirs upstream on the Chattahoochee.

Florida's allegations drive at the heart of the Corps' operation of that system. *See* Compl. ¶ 23 (acknowledging "[t]he Corps determines how much water

to release from its reservoirs" and that "less water reaches Florida due to ... the Corps' operational protocols"); *see also See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1200 (11th Cir. 2011) (per curiam). No water flows from Georgia into the Apalachicola unless and until the Corps releases it from Woodruff Dam. Thus, as a practical matter, the Corps must be involved in any adjudication of Florida's claim, since any resolution of that claim will need to be implemented by the Corps. *Cf. Arizona*, 298 U.S. at 571-572.[9]

Indeed, even if Georgia reduced its consumption significantly, Florida would not necessarily enjoy a corresponding increase in flow in the Apalachicola. Rather, the Corps could very well offset the impact of any change by Georgia. For instance, the RIOP specifies that during the droughts that are the focus of Florida's complaint, the Corps will release from upstream storage whatever water is necessary to maintain a 5,000 cubic-feet-per-second (cfs) minimum flow out of Woodruff Dam, but the Corps has not guaranteed any greater flow. *See* App. 4a-5a (describing the Corps' augmentation of flow). Thus, if Georgia reduced its consumption from either the Chattahoochee or the Flint, but the

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[9] A useful contrast can be drawn between this case and *Texas v. New Mexico*, No. 141, Orig., which is also pending before the Court. While both cases involve interstate disputes over water that is at times stored in federally operated reservoirs, in *Texas*, the United States plays a more ministerial role in managing a dam according to an allocation formula to which the States previously agreed, and the alleged harm is solely attributable to New Mexico's consumption downstream of the federal project. *See* U.S. Br. 5, 8. Here, by contrast, all of Georgia's withdrawals are upstream of Woodruff Dam, and the Corps' decisions about how to retain and release water at its projects throughout the Chattahoochee River to meet a variety of authorized project purposes directly affects flow at the state line.

Corps adhered to the same flow target, the effect of Georgia's reduction would not be higher flow for Florida, but rather higher levels in the Corps' upstream reservoirs (since the Corps would need to release less water to satisfy the minimum flow).

The Corps' operations and the water flow rate at the Georgia-Florida border are inextricably intertwined. The source of Florida's alleged harm (low flow rates during the dry season) directly implicates the Corps, and it would be wholly impractical to adjudicate Florida's claims without the active participation of the Corps, which is not a defendant to Florida's complaint and cannot be bound by the Court's decree unless it is a party. *See Arizona*, 298 U.S. at 572 (characterizing similar procedural posture as a disincentive "for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality").[10]

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[10] During the dry season, when both Georgia's consumption and Florida's need for more water are allegedly greatest, natural flow into the ACF Basin for prolonged periods can be much less than the 5,000 cfs that the Corps regularly delivers to Florida from Woodruff Dam. The Corps is able to meet its 5,000 cfs target only by releasing large amounts of water from storage upstream. That would continue to be true even if Georgia significantly reduced its consumption. Thus, Georgia could not assure compliance with any decree based upon the 5,000 cfs or any other state-line flow requirement unless the decree had binding instructions for how the Corps would operate. But there is a substantial question whether the United States could participate in this original case as a full party and be bound by a decree of the Court. Florida cannot name the United States as a defendant in this Court because there is no waiver of sovereign immunity, at least pending completion of the Master Manual and Florida's assertion of a proper claim against the Corps under the APA. Given the numerous other practical impediments to this litigation and deficiencies in the proposed

And the time for Florida to challenge the Corps' management of its system of dams in Georgia is not ripe. For the first time in more than half a century, the Corps will adopt a revised Master Manual for all the federal projects in the ACF Basin. The Corps was previously unable to update its operations manual because it was hamstrung by decades of litigation over its operational authority in the ACF Basin. *Tri-State*, 644 F.3d at 1182 (noting that the Corps "has made sincere efforts to effectuate permanent water supply allocations but has been thwarted by the litigation process"). The Corps has now finally been liberated by the Eleventh Circuit to take final agency action implementing a comprehensive plan of operations for the five federal dams in the ACF Basin.

In its final version, the Corps' operating manual will specify the timing of releases from its dams under various climatic conditions and will directly affect the timing of water flow into the Apalachicola. To be sure, the Corps will not (and lacks authority to) adjudicate the issue of *ownership* of the water in the ACF Basin rivers; that water belongs to the States. But the manual will govern how the Corps manages water storage and releases from its dams for a variety of congressionally authorized purposes, including water supply, navigation, hydropower, and flood control.

In updating its Master Manual, the Corps will confront both Georgia's request that the Corps facilitate additional withdrawals at Buford Dam and from the Chattahoochee River,[11] and Florida's request that the Corps operate its projects to maintain higher flows in

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complaint, the Court may deny Florida leave to file and save this question for another day.

[11] *See* Compl. ¶ 45; Fla. App. 8; Stockdale Mem. 48.

the Apalachicola River.[12] Until the Corps' proceedings are completed, neither the parties nor the Court will know whether the flow rate the Corps sets at the Georgia-Florida border injures Florida. Indeed, Florida cannot even know at this time whether, or to what extent, it will be dissatisfied with the Corps' ultimate decisions. Without knowing what the Corps' baseline for flows will be, the parties cannot practically litigate, and the courts cannot meaningfully adjudicate, a federal common-law claim that Florida is receiving insufficient water at the state line. Were the case to go forward now, the entire focus of the litigation might change once the Corps finalizes its Master Manual (assuming the long-overdue updating process were not brought to a standstill).

The Corps, in updating its manual, must take account of numerous statutory directives and considerations governing the operation of these dams. Thus, the Corps must consider not only how to reconcile the various purposes Congress has specified for those dams (such as water supply, navigation, hydropower, and flood control), but also generally applicable statutes such as the National Environmental Policy Act, 42 U.S.C. §§ 4231 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.*, the Water Supply Act of 1958, 43 U.S.C. § 390B, and the Water Resources Development Act, 33 U.S.C. § 2316, and its own regulations, *see* Army Corps of Engineers Reg. No. 1110-2-8154, § 6(b) (May 31, 1995) ("It is Corps policy to develop and implement a holistic, environmentally sound water quality management strategy for each project."). Thus, any contentions about equitable apportionment of

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[12] *See Florida Comments* 11-12.

the waters that flow through the Corps' projects cannot be evaluated in a vacuum, but must be considered against and in light of Congress's extensive legislation in this area—the interpretation and application of which falls in the first instance to federal agencies.

These federal agencies will necessarily evaluate the effect of Corps operations on the Apalachicola River, including its alleged injuries to wildlife caused by low flow. As an example, the FWS 2012 BiOp concluded that the Corps' current operations are not likely to adversely affect the Gulf Sturgeon or its eggs and "will not jeopardize the continued existence" of or "destroy or adversely modify designated critical habitat" for the fat threeridge, purple bankclimber, and Chipola slabshell mussels. *Compare* App. 8a-10a, 35a-36a, *with* Compl. ¶ 58 (alleged harm to mussels and sturgeon). As the Corps revises its Master Manual, it will again incorporate the interagency consultation process required by the Endangered Species Act, and any new information about the effect of the Corps' operations on protected species will be considered by both FWS and the Corps.

It would be counterproductive for a special master to begin amassing evidence about those same subjects at this time. The Corps should be free to devote its resources and attention to completing its current study without being diverted into litigation that will likely take years to complete. Worse still, if the special master were to take evidence without the active participation of the Corps and other agencies, the special master might well reach determinations that conflict with those of the Corps.

Once the Corps completes its updated Master Manual for the ACF Basin, then Florida—if aggrieved—may challenge the Corps' conclusions in fed-

eral district court. The APA would provide an avenue of judicial review if Florida believed that the operating procedures adopted by the Corps were arbitrary and capricious or otherwise contrary to law. Likewise, to the extent Florida disagrees with the FWS' conclusions about the effects of the Corps' operations on endangered species, it is also free to challenge those conclusions under the APA. *See Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). But Florida has not challenged the FWS 2012 BiOp, and it voluntarily dismissed its suit challenging the 2008 BiOp when the 2012 BiOp was published.[13]

Given the pendency of the Corps proceedings, it is neither necessary nor appropriate for this Court to accept Florida's invitation to initiate an original equitable-apportionment action at this time. "Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado* v. *New Mexico*, 459 U.S. 176, 183 (1982). Because the Corps is applying federal *statutory law* in its pending proceeding, that proceeding legally and logically takes precedence over a federal *common law* action.

As this Court has long recognized, "[t]here is no federal general common law," *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), and judge-made federal

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[13] Florida has an additional source of relief for economic harm caused by its oyster fishery failure. The Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, empowers the Department of Commerce to declare a "commercial fishery failure" and to direct federal funds to help restore the fishery and "assist a fishing community affected by such failure." 16 U.S.C. § 1861a(a)(1), (2). As Florida admits, the Department took precisely that step in August 2013 with respect to the Apalachicola Bay oyster fishery. Fla. Br. 20.

common law—even in the context of disputes between States—is always "'subject to the paramount authority of Congress,'" *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981) (quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931)). This Court developed the common-law equitable-apportionment doctrine "to decide river controversies between States" in the absence of any relevant federal statutes. *Arizona* v. *California*, 373 U.S. 546, 565 (1963) (citing *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922)). Since that doctrine was developed, Congress has enacted legislation extending federal regulation to many areas of our national life. As the scope of federal positive law has expanded over the years, it follows that the scope of federal common law has narrowed. *See, e.g.*, *Milwaukee*, 451 U.S. at 314 ("Federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." (citation omitted)).

Because the whole point of federal common law is to fill the interstices of federal statutory law, *see, e.g.*, *Milwaukee*, 451 U.S. at 312-317, there is no basis for applying federal common law to a dispute before the application of federal statutory law. Unless and until the Corps applies the relevant federal statutes here, this Court cannot know whether there remains an "'interstice' ... to be filled by federal common law." *Id.* at 323; *cf. Wyandotte Chems. Corp.*, 401 U.S. at 503, 505 (declining to exercise original jurisdiction where case presented problems that "many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis" and would require "primarily skills of factfinding,

conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies").

There is no basis for applying federal common law to address alleged injuries that fall within the broad scope of the thicket of federal environmental and natural resource statutes, and certainly not before those statutes have been applied, Florida has determined that they fail to address its alleged injuries, and an APA action has been unsuccessful. Then, and only then—after the application of the relevant federal statutes and the subsequent determination whether Florida is injured—will it be possible to determine whether there remains any common law claim at all for whatever particular injury is left.[14]

B. Florida Has Not Alleged Any Injury Sufficient To Warrant This Court's Exercise Of Its Original Jurisdiction

Coupled with the above practical impediments are the legally insufficient allegations in Florida's complaint, which also make this case unsuitable for exercise of the Court's original jurisdiction. The complaint fails to make out a plausible case that Georgia's consumption is causing significantly reduced flows at the state line,

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[14] Although Georgia has previously suggested that Florida might be entitled to bring an equitable apportionment action in this Court at some point (see Opp. 32-33 & n.10, *Florida* v. *Georgia*, Nos. 11-999, -1006, -1007 (U.S. May 25, 2012)), Georgia has never suggested that Florida could bring—before the conclusion of the ongoing Corps proceeding—such an action to redress alleged injuries potentially within the scope of the federal legislation the Corps is applying, see, e.g., *Arizona*, 373 U.S. at 565 (declining to apply equitable-apportionment doctrine in light of relevant federal statutes).

and it also fails to tie Florida's alleged injury to such reduced flows.

Florida's allegations about water consumption by Georgia are not only flawed, but also mischaracterize the source documents on which they rely. Florida relies heavily on highly selective citations to the documents incorporated by reference into its complaint. In particular, Florida attaches and relies on the affidavit submitted by Judson Turner in support of Georgia's revised 2013 water supply request to the Corps as supposedly establishing that metropolitan Atlanta currently withdraws 360 mgd from the Chattahoochee.[15] Compl. ¶ 45 (citing Fla. App. 7). But Florida neglects to mention that the same affidavit establishes that roughly 70% of this water is *returned* to the Chattahoochee and is available for downstream uses. *See* Fla. App. 15 (describing how in 2011, roughly 219 mgd were returned to the river); *see also* App. 41a-42a (showing that, in addition to the 219 mgd returned to the Chattahoochee, Georgia returns 38 mgd to Lake Lanier itself).[16] Thus, according to the documents on which Florida itself relies, metropolitan Atlanta's net consumption stands at roughly 0.8% of the entire annual average daily flow of Florida's Apalachicola River. App. 41a-42a; Fla. App. 16.

Likewise, Florida's claims based on Georgia's projected future use are incomplete and misleading. Florida notes that Georgia has requested that the Corps

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[15] One million gallons per day is approximately equal to a flow of 1.55 cfs.

[16] Florida has submitted Mr. Turner's affidavit but not its supporting exhibits. The cited document is Exhibit 4 to the Turner affidavit and is referenced at page 6 of Florida's appendix.

make available storage in Lake Lanier sufficient to support 705 mgd of gross withdrawals for the metropolitan Atlanta region by the year 2040.[17] Compl. ¶ 45. But Mr. Turner's affidavit explains that Georgia expects to return 78% of these withdrawals (or 550 mgd) back to the river if the Corps grants Georgia's request. Fla. App. 16. This total net withdrawal of 155 mgd will constitute a mere 1.1% of average daily flow at the Florida-Georgia border. *Id.* As a technical exhibit to the Turner affidavit shows (App. 47a-51a, 56a-57a), "Georgia's water supply request is projected to have a minor impact on the flow in the Apalachicola River at the state line" (Fla. App. 25).

To be sure, severe droughts will reduce the flow of water available to Florida. But those natural droughts reduce Georgia's access to water as well, and nothing in Florida's complaint suggests that Georgia consumes more than its fair share of water during these droughts—particularly given that Florida comprises only 11% of the drainage area of the ACF Basin, while Georgia comprises approximately 74%. *See supra* p. 5. Moreover, the Corps presently augments flows to en-

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[17] To the extent Florida alleges separate harms from Georgia's consumption that may occur in 2040, those are too remote in time to justify this Court's intervention now. *See Alabama*, 291 U.S. at 292 (alleged harm must be "imminent" to warrant exercise of original jurisdiction). The Corps has not yet even decided whether to grant Georgia's water supply request for 2040, and if it does, that decision would be subject to judicial review under the APA, to the extent embodied in a final agency action and challenged by a party with standing. But at this stage, any allegations of harm from projected water use twenty-six years in the future are too speculative to warrant this Court's intervention. *See Connecticut*, 282 U.S. at 674 (injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future").

sure that Florida receives a minimum flow of 5,000 cfs at the state line to minimize any adverse effects to federally listed species in the Apalachicola. *See* App. 16a-23a (detailing schedule of releases). When net basin inflows fall below 5,000 cfs, the Corps supplements them by releasing water stored in the Corps' upstream reservoirs at Buford, West Point, and Walter F. George Dams. *Id.* 16a. The Corps releases higher flows to benefit threatened and endangered species at other times, and the flow out of Woodruff Dam historically is well in excess of the 5,000 cfs minimum. *Id.* 27a (flows below 5,050 cfs occurred on 0.9% of observed days from 1975-2008).

But even if Florida's claims of reduced flows into the Apalachicola River are accepted, Florida still has not plausibly alleged that those reduced flows cause any significant harm. Notably, Florida does not claim that its citizens are being deprived of water for drinking, domestic, agricultural, or other consumptive uses. *Cf. Tri-State*, 644 F.3d at 1190 (noting that metropolitan Atlanta uses the Chattahoochee River for drinking, municipal, and industrial purposes). Instead, Florida asserts that Georgia's consumption has "diminish[ed] the likelihood" that certain endangered and threatened "species will survive." Compl. ¶ 59. But the document Florida cites as support, the 2012 BiOp (*id.* ¶ 53), finds that the Corps' current operations are *not* likely to jeopardize the three listed mussel species in the Apalachicola on which Florida focuses or the rest of the more than thirty other listed species considered. App. 8a-10a, 35a-36a.

Florida also alleges that low flows have caused commercial harm to its oyster fishery in the Apalachicola (which does not involve threatened or endangered species). But Florida fails to allege any plausible connection between Georgia's water consumption and the

"collapse of the Apalachicola Bay oyster fishery." Compl. ¶ 54. Tellingly, the complaint does not allege that Apalachicola oyster landings have gradually diminished over time in proportion to Georgia's alleged increase in water consumption. To the contrary, the complaint alleges that oyster landings precipitously dropped by "62.3 percent" during the 2012-2013 winter season. *Id.* ¶ 56. That sudden and recent shock to oyster landings is completely disconnected from Florida's allegation that Georgia caused that harm by gradually increasing its consumptive uses since January 3, 1992. Compounding this problem, Florida fails to explain why its arbitrary request to cap Georgia's consumption at January 3, 1992 levels in any way corresponds to or effectively remedies a collapse in Florida's oyster fishery that occurred more than twenty years later. Compl. 21.[18]

Florida's elected officials have themselves attributed the 2012-2013 decline to far more plausible causes, which Florida's complaint summarily discounts. *See, e.g.*, Compl. ¶ 44 (asserting that "[c]hanging climatic conditions cannot ... explain reductions in inflows to the Apalachicola River"). In the midst of Florida's oyster troubles in 2012, Governor Rick Scott sought and received a declaration of a commercial fishery failure from the Department of Commerce. *Id.* ¶ 56. Governor

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[18] Florida's allegations of increased salinity in Apalachicola Bay (Compl. ¶ 56) are similarly deficient. As Florida itself has recognized, the Bay's salinity levels are affected by myriad factors other than Georgia's consumption, including "[r]iver flow, local rainfall, wind speed and direction, tidal currents, and basin configuration," which have different levels of importance in different portions of the Bay. Edmiston, Florida Department of Environmental Protection & National Oceanic and Atmospheric Administration, *A River Meets the Bay: The Apalachicola Estuarine System* 19 (Dec. 2008).

Scott's letter was drafted outside the context of litigation and candidly attributed reduced oyster harvests to two factors: (1) the "Apalachicola, Flint, and Chattahoochee Rivers, have experienced drought conditions for several years;" and (2) "overharvesting of illegal and sub-legal oysters" in response to the suspension of oyster harvesting in contiguous states (as a result of the Deepwater Horizon oil spill) have led to fewer oyster landings. App. 59a; *see also id.* 76a-77a.

Governor Scott nowhere suggested in that letter that the difficulties in Florida's oyster industry could be traced to Georgia's alleged overconsumption of water. And Florida's own Fish and Wildlife Conservation Commission concluded that years of drought have contributed to Florida's oyster fishery troubles not just in Apalachicola Bay, but across eight counties along Florida's Gulf Coast. Sempsrott et al., Florida Fish and Wildlife Conservation Commission, *Apalachicola Bay Issues—Oysters: Review and Discussion* 5-6 (Oct. 22, 2012).

Florida's attempts to attribute the 2012-2013 low oyster harvest to Georgia's upstream water usage do not even cross "'the line between possibility and plausibility'" necessary for an ordinary complaint filed in district court, *see Iqbal*, 556 U.S. at 678—much less the far more demanding standard that this Court has established for commencement of an original case. In light of the significant costs that accompany this Court's extraordinary exercise of original jurisdiction and the Court's important gatekeeping function at this stage, Florida must allege a theory of liability that goes well beyond mere "conceivab[ility]." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). Florida's allegations do not come close; to the extent they are not refuted by Florida's own submission, they are plainly "in line with a

wide swath of" other, more probable factors contributing to any declining flow in the Apalachicola River, *cf. id.* at 554, such as the recent overharvesting of oysters and exceptional droughts that have struck the ACF Basin.

In sum, Florida has not pleaded facts plausibly suggesting that it will be able to establish clear and convincing evidence that it suffers substantial injury as a result of Georgia's consumption of water.[19] *See Idaho ex rel. Evans*, 462 U.S. at 1027 ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage."); *Alabama*, 291 U.S. at 291 (allegations must be "clearly sufficient to call for a decree in [plaintiff State's] favor"). The Court should therefore deny Florida leave to file its complaint.[20]

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[19] The insubstantiality of Florida's allegations is particularly apparent when considered in light of the socially beneficial uses to which Georgia has put the Chattahoochee and Flint Rivers—supporting a major American metropolis and a thriving agricultural region. *See Colorado* v. *New Mexico*, 459 U.S. 176, 187 (1982) (recognizing that "the equities supporting the protection of existing economies will usually be compelling"); *cf. Connecticut*, 282 U.S. at 673 ("Drinking and other domestic purposes are the highest uses of water.").

[20] At a minimum, the Court should allow Georgia to file a prompt motion to dismiss the complaint and entertain full briefing and argument on that motion, without referring the case to a special master. *See Texas*, 2014 WL 273246 (U.S. Jan. 27, 2014); *see also Idaho ex rel. Andrus* v. *Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (grant of leave to file "is not a judgment that the bill of complaint ... states a claim upon which relief may be granted"). As noted above, there is substantial reason to doubt that Florida's proposed complaint sets forth a basis for this Court to grant relief. First, the relief Florida has requested—consumption caps on Georgia—would not necessarily remedy the harm Florida has alleged. Second, it is questionable whether this Court can effectively grant Florida alternative relief (that Florida has not requested) regarding state-line flows,

CONCLUSION

Florida's motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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when that remedy requires implementation by the Corps but the Corps is not a party to this action. Third, the complaint does not adequately allege a substantial injury caused by Georgia that warrants resolution through an extraordinary equitable-apportionment action. If the complaint is deficient on these or other grounds, then the case should not proceed past the pleading stage.